

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF INSURANCE,

Petitioner,

vs.

GERALD L. CUMMINGS,

Respondent.

No. 05-1686 DI

DECISION

The Director of Insurance ("the Director") has not offered any evidence showing that Gerald L. Cummings is subject to discipline.

Procedure

On November 16, 2005, the Director filed a complaint seeking to discipline Cummings' bail bond agent license. Cummings was served with a copy of the complaint and our notice of complaint/notice of hearing on November 29, 2005. The Director filed an amended complaint on March 20, 2006. We held our hearing on July 6, 2006. Kevin Hall appeared for the Director. Neither Cummings nor anyone on his behalf appeared. The Director filed his brief on August 3, 2006. Cummings filed no written argument.

Findings of Fact

1. The Director issued a bail bond agent license to Cummings on November 22, 1994. The license expired on November 22, 2005.
2. Cummings was indicted in Cass County, Missouri, for one count of possession of a controlled substance and two counts of carrying a concealed weapon, each committed on February 26, 2002.
3. On February 23, 2005, the Circuit Court of Cass County, Missouri, found Cummings guilty on Count I: a Class C felony of possession of a controlled substance, in violation of § 195.202, RSMo 2000,¹ and on Count II: a Class D felony of unlawful use of a weapon, in violation of § 571.030.1(1), RSMo 2000. On April 18, 2005, the court suspended the imposition of sentence and placed Cummings on probation for five years on Counts I and II. The court records submitted do not indicate whether the court's findings of guilt was after trial or after a plea of guilty or nolo contendere.
4. The court records submitted do not indicate what happened concerning Count III.
5. A person with a bail bond agent license works under a person with a general bail bond agent license.² In January 2005, when Cummings was already licensed as a bail bond agent, he filed an application with the Director to be licensed as a general bail bond agent.
6. In response to Cummings' application for a general bail bond license, the Director wrote letters to Cummings dated February 1, 2005, March 3, 2005, and May 5, 2005. In each letter, the Director requested information from Cummings regarding his application. Cummings did not respond to the letters.

¹Statutory references are to the 2005 Supplement to the Revised Statutes of Missouri unless otherwise noted.

²Section 374.700(1) defines bail bond agent as "a surety agent or an agent of a property bail bondsman who is duly licensed pursuant to the provisions of section 374.695 to 374.789, is employed by and is **working under the authority of a licensed general bail bond agent[.]**" (Emphasis added.)

Conclusions of Law

We have jurisdiction to hear the Director's amended complaint.³

Count I – Findings of Guilt

The law places upon the Director the burden of proving facts showing that a statute authorizes discipline of a licensee.⁴ The law requires that the Director prove facts by a “preponderance of the evidence.” The Court of Appeals has defined “preponderance of the evidence” as evidence “that is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.”⁵

In § 374.755, the General Assembly set forth what the Director must prove to discipline a licensee. In Count I of his amended complaint, the Director asserts that he can prove that Cummings should be disciplined under § 374.755.1(2). In that law, the General Assembly requires the Director to prove that Cummings has a:

[f]inal adjudication or a plea of guilty or nolo contendere within the past fifteen years in a criminal prosecution under any state or federal law for a felony or a crime involving moral turpitude whether or not a sentence is imposed, prior to issuance of license date[.]

a. Final Adjudication

The Director presented evidence consisting of two certified records from the Circuit Court of Cass County, which we admitted as Petitioner's Exhibit 2. One record is the indictment of Cummings. The other is entitled “Sentence and Judgment.” Neither record proves that there

³Section 621.045.

⁴*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

⁵*State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

was a “[f]inal adjudication or a plea of guilty or nolo contendere.” For a “final adjudication” in a criminal case, the law requires the circuit court to impose a sentence and not just suspend the imposition of the sentence.⁶ The court record entitled “Sentence and Judgment” shows “imposition of sentence suspended” for both Counts I and II. Therefore, the court records that the Director submitted fail to prove that there was a “final adjudication.”

b. Plea of Guilty or Nolo Contendere

The court records also fail to show any plea of guilty or nolo contendere. The “Sentence and Judgment” simply states, “the defendant is found GUILTY BY THE COURT to the offenses of [possession of a controlled substance and unlawful use of a weapon].” (Underlining added.) The court records do not show whether the court’s finding of guilt was based upon a plea of guilty or nolo contendere. The record leaves open the possibility that the court’s finding of guilty was the result of a trial. It has been our experience that when licensing agencies want to prove a plea of guilty, they submit court records, for example, the docket sheet, showing that the defendant pled guilty. We do not know whether the Director tried to get such records or whether the court had them. We base our decision upon the court records that the Director submitted. Those records fail to show that Cummings pled guilty.

For these reasons, we conclude that the Director has failed to prove that Cummings is subject to discipline under § 374.755.1(2).

c. 15-Year Cutoff Date

Even if the Director had shown that Cummings pled guilty, we would have to know when the guilty plea occurred because the General Assembly has enacted a cutoff date of 15 years in § 374.755.1(2). The guilty plea must be “within the past fifteen years.” The legislature put the

⁶*Yale v. City of Independence*, 846 S.W.2d 193, 194 (Mo. banc 1993).

language “prior to the issuance of license” at the end of the provision, separating it from what goes before by a comma. Normally, that would indicate that the “prior to issuance of license date” modifies all that goes before the comma. In other words, the provision would read that the guilty plea must be “within the past fifteen years . . . prior to the issuance of license date.” This would mean that the General Assembly allows discipline for licensees who have pled guilty within 15 years prior to their license date, but not for licensees who have pled guilty after they have been licensed. On the other hand, the Director argues that “prior to the issuance of the license” “merely refers to the preceding language regarding the imposition of sentence in criminal prosecutions.”⁷ The Director’s interpretation still does not tell us when the 15-year cutoff begins.

No matter how the statute should be interpreted, there must be a final adjudication or a plea of guilty (or nolo contendere) to which we apply the 15-year cutoff. As explained before, the Director failed to prove either that the court imposed sentence on Cummings so that there was a “final adjudication” or that Cummings entered a plea of guilty (or nolo contendere). Thus, there is no event to which we can apply the 15-year cutoff. We must leave our determination on how to interpret the 15-year cutoff language in § 374.755.1(2) for another case where the Director will have proven that there was a final adjudication or the appropriate plea.

Count II – Refusal to Furnish Information

The Director argues that Cummings is subject to discipline under § 374.755.1(6), which authorizes discipline for:

Violation of any provision of or any obligation imposed by the laws of this state, department of insurance rules and regulations,

⁷Petitioner’s Brief, ¶ 5.

or aiding or abetting other persons to violate such laws, orders, rules or regulations, or subpoenas[.]

(Emphasis added.)

a. Refusal to Respond to the Director's Letters

The first violation that the Director asserts is Cummings' refusal to respond to any of the letters sent to him in February, March and May 2005 requesting information concerning Cummings' application for a general bail bond agent license. The Director alleges that this refusal violates § 374.210.2, RSMo 2000, which states that:

[a]ny person who shall refuse to give such director full and truthful information, and answer in writing to any inquiry or question made in writing by the director, **in regard to the business of insurance carried on by such person**, or to appear and testify under oath before the director in regard to the same, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding three months.

(Emphasis added.)

As we explained in the Findings of Fact, a "bail bond agent" works under a "general bail bond agent." The Director issues a different license for each profession. This proceeding is an action to discipline the bail bond agent license of Cummings. The letters to which Cummings failed to respond concern only his application for a general bail bond agent license.

The General Assembly limited a licensee's duty to respond to those inquiries of the Director that are "in regard to **the business of insurance** carried on by such person."⁸

(Emphasis added.) The Director never establishes that the business of a bail bond agent is "the business of insurance." The only reference to insurance in the "Professional Bail Bondsman and

⁸Section 374.210.2, RSMo 2000.

Surety Recovery Agent Licensure Act,” §§ 374.695 to 374.789, is the definition of “insurer” at § 374.700(6): “any surety insurance company which is qualified by the Department to transact surety business in Missouri.” The statutes never refer to a bail bond agent or a general bail bond agent as an “insurer” and never refer to their business as “insurance.” Even assuming that a bail bond agent’s business is the business of insurance, Cummings did not violate § 374.210.2 because the Director’s inquiries to Cummings were not about his ongoing bail bond business; they related exclusively to Cummings’ application to do business as a “general bail bond agent.” Section 374.210.2 is limited to inquiries about a person’s ongoing business. Therefore, the Director has failed to prove facts showing that Cummings violated § 374.210.2, RSMo 2000, and, as a result, fails to show that Cummings is subject to discipline under § 374.755.1(6).

b. Criminal Offenses

The second allegation is that the criminal acts underlying the court’s findings of guilt are sufficient cause for discipline under § 374.755.1(6). The amended version of the statute on which the Director relies is the one that became effective on January 1, 2005.⁹ According to the indictment, Cummings committed the criminal offenses on February 26, 2002, well before the amended version of § 374.755.1(6) became effective. Through the enactment of § 1.170, RSMo 2000,¹⁰ the General Assembly requires us to apply the version of § 374.755.2(6) that was effective on the date of Cummings’ conduct. Since the criminal offenses took place on February 26, 2002, we look to the version of § 374.755.2(6) effective then. That version is in the 2000 Revised Statutes of Missouri and allows discipline for:

⁹L. 2004, SB 1122 § B (92nd Gen. Assbly., 2nd Reg. Sess’n).

¹⁰See *Comerio v. Beatrice Foods Co.*, 595 F.Supp. 918, 920-21 (E.D. Mo., 1984).

[v]iolation of, or assisting or enabling any other person to violate, any provision of sections 374.700 to 374.775 or of any lawful rule or regulation promulgated pursuant to sections 374.700 to 374.775[.]

While the January 1, 2005, version of the statute expanded the scope of violations to those against obligations imposed “by the laws of this state,” the version effective in 2002 restricted the violations to the provisions of “sections 374.700 to 374.775.” According to the court records, Cummings violated the criminal laws at §§ 195.202 and 571.030.1(1), RSMo 2000. Those sections are not within §§ 374.700 to 374.775. Therefore, the Director has failed to prove facts showing that the version of § 374.755.1(6) effective in 2002 allows him to discipline Cummings for the criminal offenses he committed then.

Count III - Incompetency or Misconduct

a. Criminal Offenses

In paragraphs 10 and 11 of his amended complaint, the Director alleges that the criminal offenses that Cummings committed in 2002 rendered him guilty of “incompetency or misconduct” in the performance of the functions or duties of a bail bond agent. The Director cites § 374.755.1(5), which authorizes discipline for:

[m]isappropriation of the premium, collateral, or other things of value given to a bail bond agent or a general bail bond agent for the taking of bail, **incompetency, misconduct,** gross negligence, fraud, or misrepresentation **in the performance of the functions or duties of the profession licensed or regulated by sections 374.695 to 374.775[.]**

(Emphasis added.) Again, the Director relies upon the amended version of § 374.755 that was not yet effective at the time of the commission of the criminal offenses in 2002. By force of

§ 1.170, RSMo 2000, we refer to the version of the law effective in 2002. The original and amended versions of § 374.755.1(5) are identical in regard to incompetency and misconduct.

The version of § 374.755.1(5) effective in 2002 authorizes discipline for:

Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of the profession licensed or regulated by sections 374.700 to 374.775[.]

(Emphasis added.) Incompetence is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.¹¹ Misconduct is the intentional commission of a wrongful act.¹²

The Director's only evidence is contained in the court records in Petitioner's Exhibit 2. That evidence shows nothing about whether Cummings committed the crimes in the performance of his functions or duties as a bail bond agent. Therefore, the Director has failed to prove facts showing that Cummings is subject to discipline under § 374.755.1(5), RSMo 2000.

b. Refusal to Respond to the Director's Letters

The Director includes Cummings' refusals to respond to the letter inquiries as showing incompetency and misconduct. The letter inquiries occurred after January 1, 2005, so the amended version of § 374.755.1(5) applies. As we explained under Count II, Cummings' refusal to respond did not involve the functions and duties of his present profession (bail bond agent), but rather involved his application for a license to practice a different profession (general bail bond agent). Because the Director has failed to show that Cummings has committed incompetency or misconduct in the performance of his duties as bail bond agent, the Director has failed to prove that Cummings is subject to discipline under § 374.755.1(5).

¹¹Section 1.020(8), RSMo 2000; *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004).

¹²*Grace v. Missouri Gaming Comm'n*, 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

Summary

The General Assembly established this Commission to be a neutral and impartial decision maker separate from the prosecutorial function of the licensing agencies.¹³ The General Assembly requires us to apply its laws to those facts that a licensing agency proves. We have done so in this case with the result that a person whom a court has found committed serious felonies will not have a record made of any disciplinary violations involving the bail bond agent license he used to have. However, as we have explained, we base this result on the way the laws are written and on the evidence that the Director presented.

We find no cause to discipline Cummings under § 374.755.1(5) or (6), RSMo 2000, or under § 374.755.1(2), (5) or (6).

SO ORDERED on November 7, 2006.



JOHN J. KOPP
Commissioner

¹³*State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 74 (Mo. banc 1982).